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When gender and gender identity are not the same

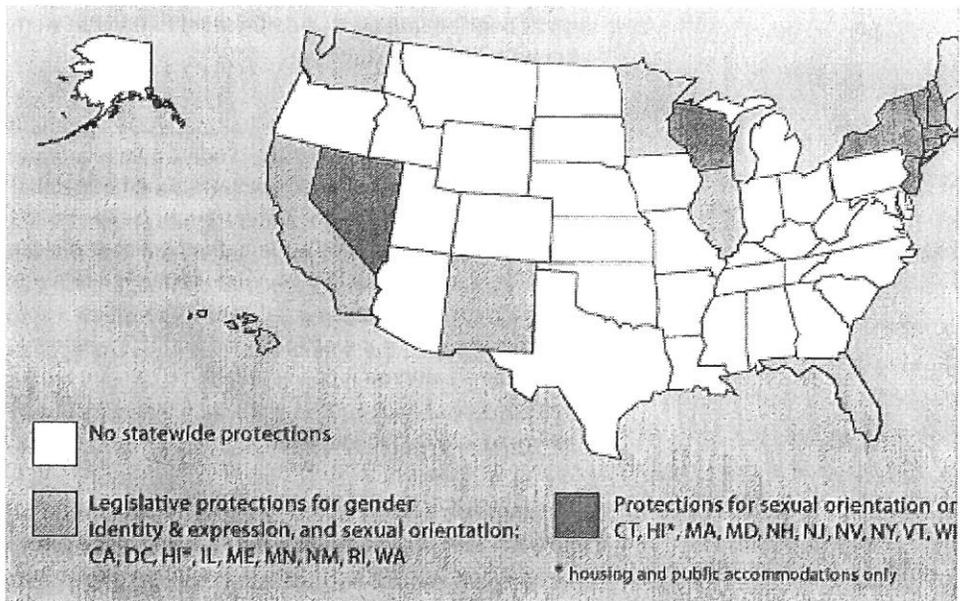
How Minnesota protects the rights of transsexuals and others whose self-image differs from their biology

While few states in the Union have laws against discrimination based on sexual orientation -- only 17 states and the District of Columbia recognize sexual orientation as a protected class -- even fewer protect the rights of people whose gender identity is not the same as their biological identity. Minnesota, through its state Human Rights Act, is one of only eight states that protect a category that might be broadly called "gender identity or expression."

Since sexual orientation was added to the Human Rights Act in 1993, it has included in its definition of sexual orientation "having or being perceived as having a self image or identity not traditionally associated with one's biological maleness or femaleness."

The Act thus protects the rights of a broad class of individuals who are sometimes referred to as transgender. This includes transsexuals-- people whose innate sense of gender conflicts with their anatomical sex, and who sometimes undergo surgery to eliminate this conflict -- as well as those who may plan no surgery or other treatments, but feel that their biological sex does not reflect their true self.

(article continued below map)



For a state to include -- or not include -- sexual orientation in its anti-discrimination statutes can be controversial; to include protection for

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"gender identity" can be even more so. Yet despite more than a dozen years of such coverage in Minnesota and a few well-publicized cases, the Department of Human Rights has hardly seen a flood of gender identity cases. In 2005 the Department handled 1,168 charges; of those, only five involved an allegation of gender-identity discrimination. In fact, since gender-identity became protected in 1993, only 47 charges had been filed as of the end of 2005.

In one charge filed in 2000 against the city of Rochester, an individual who had undergone sexual re-assignment surgery to become a woman alleged that she had been denied the use of the female locker room at a municipal swimming pool. The pool manager allegedly regarded her as male and insisted she use the men's locker room, even though she was able to show him a driver's license that identified her as female. The manager concluded that she had been a man and inquired as to whether she still had a penis. Humiliated in front of her two children, the woman left but returned the next day, still insisting on using the women's locker room. Eventually the manager called the police, who ordered the woman to leave and threatened to use force if she refused.

The Department of Human Rights found probable cause to believe that the city had discriminated against the woman. In a negotiated settlement, the city admitted no wrongdoing but agreed to pay her \$16,250 and to provide training on transgender issues for its employees.

Another case before the Minnesota Department of Human Rights did not involve an allegation of discrimination based on sexual orientation, but of sex discrimination brought by a Minneapolis school teacher who objected to a transgendered coworker's use of the women's restroom. After working for the school district for almost 30 years, a teacher informed the school's administration that he was transgendered and would "transition from male to female" and would henceforth be known as "Debra Davis" in the workplace. On advice of legal counsel, the district decided that Davis had the right to use the women's restroom after he began his transition.

One day a few months later, in October 1998, another teacher, Carla Cruzan, observed Davis in the women's faculty restroom and complained to school administrators. She later filed her charge with the Minnesota Department of Human Rights, alleging that by permitting Davis to use the women's room, the district had discriminated against her. The Department dismissed her charge, finding that there was no probable cause to believe a discriminatory practice had occurred. Cruzan then sued the school district in U.S. District Court, alleging that the school's restroom policy amounted to sexual harassment and religious discrimination. The suit was unsuccessful and the court affirmed that the school district had not violated Cruzan's rights.

Although an employer may grant a transgendered employee the right to use the restroom consistent with the employee's self-identify, another pivotal court decision suggests that an employer may not be legally required to do so. Juli Goins (formerly Justin Goins) had transitioned from male to female in terms of gender-identity several years before getting hired at West Publishing. Although she had not undergone

sexual reassignment surgery, her driver's license and birth certificate now identified her as female, and she dressed and presented herself as a woman. Coworkers at West, however, regarded her as male, and female employees objected to her use of the women's restroom. Her employer sought a compromise by insisting that she use the men's restroom or one of the company's single-occupancy restrooms. Goins objected, and was warned that she would face disciplinary action if she continued to use the women's lavatory. Citing the stress and hostility she had experienced, Goins resigned. She subsequently filed a lawsuit alleging sexual orientation discrimination, in violation of the Human Rights Act.

In a decision that went all the way to the state Supreme Court, Goins' claim of discrimination was rejected. The Court found that the employer's decision to deny Goins' use of the women's restroom was based on her biological gender, not her sexual orientation; and that, therefore, the employer's policy could not be viewed as discriminatory. To conclude that the Human Rights Act restricts an employer's ability to designate restrooms based on biological gender would likely restrict employers in the gender-designation of shower and locker room facilities, and lead to a result not intended by the legislature, the Court ruled.

The Goins decision dismayed advocates for the rights of transgendered individuals, yet left intact the fundamental protections that exist for transgendered people under the state Human Rights Act. (The case was never before the Department of Human Rights but was filed directly in district court; thus, the Department did not issue a finding on its merits.)

Under the Minnesota Human Rights Act, transgendered individuals -- like all other Minnesotans -- are entitled to be free from discrimination based on their sexual orientation. This protection extends, with some limitations and exceptions, to all areas covered by the Act: employment, housing, public accommodations, public services, education and business and credit. Transgendered individuals are not entitled to have their sexual orientation "reasonably accommodated" by an employer or anyone else. A reasonable accommodation is typically a modification of some kind, as might be provided in a work environment for an individual with a disability.

There are situations, however, in which an employer might have to make an accommodation for a transgendered individual, on the basis of disability. "Gender dysphoria" or "gender identity disorder" is a condition in which a person has been assigned one gender but identifies as belonging to another gender, and it may be considered a disability if there is evidence of clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Under the Human Rights Act, a disability is defined in part as a condition materially affecting one or more major life activities. Could a person with gender dysphoria be considered disabled under the Human Rights Act, and therefore entitled to an accommodation?

"That could be," says Steve Lapinsky, supervisor of the department's

disability unit. "If a psychiatrist says, you have gender dysphoria and that's why your major life activity of interacting with others is materially impaired." To deal with that "impairment", a psychiatrist might conceivably recommend that a person dress as the biologically opposite gender in preparation for sexual reassignment surgery. "There is the possibility that gender dysphoria would rise to the level of a disability and the employer would have to accommodate it," says Lapinsky.

The idea that one is mentally ill because one identifies as belonging to the other gender would be anathema to the beliefs of many in the Gay, Lesbian, Bisexual and Transgender community. To say that cross-dressing indicates a disorder could be at cross-purposes with the goals of those who seek to de-stigmatize sexual orientation and strive for greater social acceptance. It wasn't too long ago that anyone who was not heterosexual might have been considered mentally ill. For most of the 20th Century, the American Psychiatric Association considered "homosexuality" a diagnosable mental disorder; it wasn't until 1973 that the Association changed its mind and declared that being gay was not an illness.

The times were changing, and the GLBT community was fighting for and achieving acceptance throughout the country and -- especially -- in Minnesota. According to the National Center for Transgender Equality, the first city in the United States with a law prohibiting discrimination based on gender identity was Minneapolis. In 1975, Minneapolis passed a groundbreaking ordinance protecting "affectional preference" and defining it as "having or manifesting an emotional or physical attachment to another consenting person or persons, or having or projecting a self-image not associated with one's biological maleness or femaleness." The city of Saint Paul passed a similar ordinance that included protection for sexual identity in 1990, three years before the state Human Rights Act would include such protection for everyone in the state.

Other cities and states would eventually follow with protection for gays, lesbians, bisexuals -- and transgendered individuals. From Pittsburgh to Peoria, from Tucson to Toledo, cities moved more rapidly than states to protect gender identity. As a result, although only eight states protect transgendered individuals, more than 70 U.S. cities have adopted this protection. That means that about 31% of the U.S. population now lives in areas that protect gender identity through anti-discrimination laws.

There is still no federal law that prohibits discrimination in the workplace based on sexual orientation; Title VII of the Civil Rights Act does not, and in fact, the only federal protection for gays and lesbians is contained in an executive order that covers only federal employees. For the GLBT community and its advocates, a federal law protecting gender identity would appear to be even more of an uphill battle. But the battle continues, as more cities and states consider whether having or being perceived as having "a self image or identity not traditionally associated with one's biological maleness or femaleness" is deserving of protection under the law.